From: Stanley A. Klein
To: Microsoft ATR
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Subject: Microsoft Settlement

In my view, Microsoft has used a large number of approaches in maintaining its monopoly. The proposed settlement essentially gives Microsoft a government-endorsed license to continue using many of these approaches. Two issues that I will address are the business model apparently assumed by the proposed settlement and Microsoft's use of its office application proprietary data formats as a means of maintaining its monopoly.

Implicitly Assumed Business Model

The proposed settlement appears to implicitly assume that the basic business model of the software industry is the closed source model. Under this model, which is used by Microsoft and many other companies, the intellectual property in the software is kept as the proprietary property of the provider. Source code and much of the documentation are disclosed only under limited circumstances, generally involving payment of fees and execution of non-disclosure agreements.

Continued dominance of this business model in the marketplace is very much in the interest of Microsoft, and is especially reflected in the requirement of Clause (ii) of Definition N that defines a Non-Microsoft Middleware Product as one distributing at least one million copies a year.

There is another business model, known as the free software or open source business model. (The term "free" in "free software" is in the sense of libre, not necessarily in the sense of gratis.) In this business model, the intellectual property in the software is dedicated to what Lawrence Lessig calls an "innovation commons." There is no fee, royalty, or permission required for the right to obtain the source code, or to copy, modify, or distribute the software. The details, history, implications, and important public benefits of this business model are best explained (in terms understandable by legal professionals) in Lessig's book "The Future of Ideas."

According to numerous press reports, many public statements of its executives, and (in at least one case) an explicit provision included in a non-negotiable end user license agreement, Microsoft regards the free/open-source business model as a major potential competitive threat. The inclusion of clause N (ii) of the settlement allows Microsoft to refuse to provide rights under the settlement to products of ISV's who adopt the free/open-source business model.

For example, it may be almost impossible to determine how many copies of a free/open-source middleware product or software application are distributed in any given year. The software is freely copyable and redistributable by

anyone. There is no license registration required under the free/open-source business model, and no other indication that a copy has been distributed unless the user has contracted for value-added services (such as warranty or support) from a particular distributor of the software.

As a minimum, Clause N (ii) should be deleted. In addition, the entire settlement should be reviewed to ensure that none of its provisions allow Microsoft to withhold rights under the settlement from ISV's who are part of the community surrounding the free/open-source business model. In that community, a relevant ISV could be a single, technically-qualified individual who makes significant contributions of software to the innovation commons on a spare-time basis. This is reasonable, because software produced by such individuals is often used by millions of users.

Office Applications

In my experience, one of the major approaches used by Microsoft in maintaining their monopoly is through their office applications, including Word (word processing), Excel (spreadsheet), Powerpoint (presentation slides), and Access (database). This approach would have been blocked had Microsoft been broken up as provided in the original decision of Judge Jackson. The break-up having been disallowed by the Appeals Court, there need to be provisions added to the settlement that block this approach.

Microsoft maintains its monopoly through its office applications by using proprietary file formats that can only be properly interpreted or produced by Microsoft products that run only on Microsoft operating systems.

I am an independent consultant in computers, communications, and management science. I have long preferred office applications produced by competitors to Microsoft. My preference is based on what I regard as the superior functionality of those products. However, when I wish to exchange documents with clients or with other participants in professional committees, I am often forced to use formats compatible with Microsoft office applications or to use the Microsoft office applications themselves. Attempting to use third party software with Microsoft proprietary formats often leads to difficulty, because Microsoft uses a variety of technical and legal measures to make it difficult for competing applications to interpret or produce documents in their proprietary file formats. As a result, it is very difficult for a user to avoid using Microsoft applications and Microsoft operating systems if the user desires to exchange office documents with other users.

Examples of the measures used by Microsoft include making the formats for new versions of an office application incompatible with the formats of previous versions and prohibiting reverse engineering in their non-negotiable ("click-wrap") end user license agreements.

To prevent Microsoft from using such measures, I believe that the settlement be amended to:

1. Require Microsoft to openly disclose all details of its proprietary file formats, and

2. Require review by the Court of all Microsoft non-negotiable end user license agreements to ensure that the terms and conditions of such agreements do not support maintenance of Microsoft's monopoly.

To remedy the Microsoft monopoly will require an extensive period of transition during which users can be expected to use both Microsoft and competing office applications. The period of transition (and therefore the duration of the settlement requirements) should run at least ten years.

Stanley A. Klein
Principal Consultant
Stan Klein Associates, LLC
P.O. Box 2523
Rockville, MD 20847-2523
301-881-4087